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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1082

JOHN THOMAS REDMOND, *Petitioner/Appellant,*

v.

COMMONWEALTH OF VIRGINIA, *Respondent/Appellee,*

On Appeal from the Supreme Court of Appeals of Virginia

JURISDICTIONAL STATEMENT

JOHN ALVIN CROGHAN
1815 "H" Street, N. W.
Washington, D. C.
638-4328

F. CALDWELL BAGLEY
Dumfries, Virginia
703-875-9225
Attorneys for Appellant

Of Counsel:

STASSEN, KEPHART, SARKIS & SCULLIN.
Washington, D. C.

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JURISDICTIONAL STATEMENT

JUDGMENTS BELOW

A copy of the unreported opinion and judgment of the Supreme Court of Appeals of Virginia, rejecting appellant's petition for a Writ of Error and Supersedeas, and affirming the judgment of conviction entered by the Circuit Court of Stafford County, Virginia, on the 31st day of January, 1964, is annexed hereto as Appendix A-3.

JURISDICTIONAL GROUNDS

The petitioner John Thomas Redmond was arrested by a Virginia State Police Officer on December 8, 1963, and charged with operating a motor vehicle upon the public highway while under the influence of alcoholic beverages. The original warrant is a part of the record.

The case was first heard in the Stafford County Court where the defendant was found guilty and noted his appeal.

This case was tried without a jury on January 31, 1964, in the Circuit Court of Stafford County before Judge S. Bernard Coleman. The defendant was arraigned and entered a plea of "not guilty".

The Commonwealth called as its only witness the arresting officer who testified that he observed the defendant just before the arrest driving north on U. S. Route # 1 just north of the Stafford Courthouse and weaving within the driving lane. It was established that defendant, your petitioner in this Court, requested a blood test and was taken to Mary Washington College in Fredericksburg where he was refused a blood test because he asked that his arm be sterilized with alcohol.

The defendant moved to strike the evidence presented by the Commonwealth on the grounds that he had been denied the right to the blood test given him by Virginia Code Ann., Section 18.1-55 and that under such limited facts as presented said Code section made it mandatory that defendant be found not guilty where he had requested or consented to the blood test and it had not been introduced in evidence.

The Court summarily overruled this motion before hearing defendant's argument and without affording opportunity to the Commonwealth to reply.

The defendant offered no evidence and the Court found him guilty and sentenced him to a fine of $200.00 and costs. The Court suspended execution of sentence to allow for appeal.

Notice of appeal and assignments of error were filed on February 28, 1964.

Following consideration the Supreme Court of Appeals of Virginia affirmed the judgment of the Circuit Court of Stafford County on the 8th day of October, 1964.

Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the Supreme Court of Appeals of Virginia on Dec. 24, 1964.

It is believed the jurisdiction in this case conferred upon the Supreme Court of the United States under the provisions of Title 28, USCA, Section 1257.

The following cases are considered to sustain the jurisdiction of this Court: *State ex rel Paoli* v. *Baldwin,* 31 S (2) 627, 159 Fla. 165; *Hamrick* v. *Bryan,* 21 F. Supp. 392; *Powell* v. *Alabama,* 287 U.S. 45, 53 S. Ct. 55; *State* v. *Clow,* 10 N.W. (2) 359, 215 Minn. 380; *United States* v. *Sutherland,* 37 F. Supp. 344; *Reece* v. *State of Georgia,* 350 U.S. 85, 76 S. Ct. 167; *Brubaker* v. *Dickson,* 310 F (2) 30.

QUESTIONS PRESENTED ON APPEAL

(1) Whether the appellant effectively was denied due process of law under the Fourteenth Amendment to the U.S. Constitution when the trial judge in the Circuit Court for Stafford County, Virginia, summarily and arbitrarily refused to hear appellant's counsel argue his motion to strike the Commonwealth's evidence which was based on a highly technical, controver-

sial and legal interpretation of the Virginia blood test statute, Section 18.1-55 of the Code of Virginia, 1950 (Michie). The essence of this question is whether, as a matter of law, the conduct of the trial judge operated to deprive appellant of a hearing within the historical and traditional legal meaning of the term.

(2) Whether the trial judge denied the appellant the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States when he enforced against the appellant an interpretation of the Virginia blood test statute, Section 18.1-55 of the Code of Virginia, 1950 (Michie) patently at variance with a clear mandate of the statute and widely inconsistent with the accepted pattern of judicial precedence adopted and followed by the Supreme Court of Appeals of Virginia for many years.

STATEMENT OF CASE

On December 8, 1963 at approximately 12:10 A.M., the appellant was observed by a State Trooper operating his vehicle on U.S. Highway # 1 in Stafford County north of the Courthouse in the northbound one-way drive weaving in the driving lane but not entering the passing lane or leaving the road. The officer stopped the appellant just south of Austin Run at the north end of the one-way drive. The appellant "staggered as he got out of the car and then backed up against the left side of the car. . . . .", he gave the trooper his license upon request and the trooper "noticed that there was a strong smell of intoxicating beverages on his breath . . . ," his speech was slurred and "he just looked like he was hypnotized. . . . . He would make you no answer at all part of the time".

There was no other evidence of drinking and no tests of manual dexterity were given to the appellant. He

was advised of the requirement of a blood test. He requested a blood test and was taken to Mary Washington Hospital in Fredericksburg where a Mrs. Anderson offered to wipe the appellant's arm with soap and water. The appellant at no time refused the taking of blood but asked that his arm be rubbed with alcohol. However, he was refused the test because the "rules of the hospital and also the state law. . . . . you couldn't use alcohol". Despite the appellant's insistence that he would have the test he was refused and returned to Stafford after making a telephone call.

The arresting officer, the only witness in the case appearing for the Commonwealth, was asked if he could state that soap and water would not affect the accuracy of a blood test. He was not permitted to answer upon objection by the Commonwealth.

At the trial no evidence was presented by the Commonwealth relative to the substance intended to be used for the sterilization of the instruments to be used to take the blood sample, moreover, no probative evidence was offered relative to the substance intended to be used on appellant's arm inasmuch as the nurse did not appear in Court.

The appellant moved to strike the evidence presented by the Commonwealth on the grounds that he had been denied the right to the blood test given him by Virginia Code Ann. S. 18.1-55 and that under such limited facts as presented said Code section made it mandatory that appellant be found not guilty where he had requested or consented to the blood test and it had not been introduced in evidence.

The Court summarily overruled this motion before hearing appellant's argument and without opportunity given to the Commonwealth to reply.

The appellant offered no evidence and the Court found him guilty and sentenced him to a fine of $200.00 and costs. The Court suspended execution of sentence to allow for appeal.

Notice of appeal and assignments of error were filed on February 28, 1964.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Appellant Was Deprived of a Series of Valid Defenses When the Trial Judge Refused to Hear Counsel on His Motion to Strike

1. The refusal of the Trial Court to strike out the evidence of the Commonwealth on the grounds that the blood test requested by the appellant and refused in abrogation of the right given the appellant by section 18.1-55 of the Code of Virginia of 1950 as amended, and the refusal of the trial court to permit the appellant to be heard upon such motion to strike, were fatal errors.

Appellant was given a right to a blood test under the express language of section 18.1-55 wherein it is stated:

> "(b). . . . . if the person arrested does not refuse to permit the taking of blood, or having refused, thereafter and within two hours. . . . .requests that a blood sample be taken, the person arrested *shall be entitled* (Emphasis supplied). . . ."

The Supreme Court of Appeals of Virginia in *Walton* v. *City of Roanoke,* — Va. —, 133 SE 2d 315 at 319 said of the blood test:

> ". . . . .It protects one who has the odor of alcohol on his breath but has not been drinking to excess. . . . ."

The Court in refusing to hear the argument on behalf of appellant upon his motion to strike the evidence committed a basic error for it has been said that:

> "Patience and gravity of hearing is an essential part of Justice; and an over speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions though pertinent", Bacon's essay "Of Judicature" cited at page 45 ABA, "Opinions of the Committee on Professional Ethics and Grievances," 1957 Edition.

Judical Canon 17 in pertinent part provides that:

> ". . . . . A Judge should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment". ABA, Opinions etc. cited *supra*, p. 49.

In this case the refusal of the Trial Court to hear and sustain the motion of the appellant to strike the evidence presented is directly contrary to the express language of Virginia Code Ann. S. 18.1-55 granting to the appellant the right and entitlement to a blood sample. The refusal of the blood test prevented the appellant from offering evidence in his own behalf. Until the Commonwealth's evidence reaches the level of excluding every reasonable hypothesis of innocence the appellant is not required to explain. *Coffey* v. *Commonwealth*, 202 Va. 185 at 188. Thus the failure to strike the evidence and acquit the appellant was error.

The failure of the Court to hear counsel is contrary to our system of advocacy and cannot but discourage attorneys from engaging in the full measure of representation to which litigants and defendants are entitled. This practice could, and in this case did, effectively deny appellant his "day in court".

2. The trial court erred in its finding of guilty under the express language of section 18.1-55 requiring a finding of not guilty whenever an accused requests the taking of a blood sample for chemical analysis and the result of such chemical analysis is not received in evidence for any reason whatsoever.

In this case the appellant requested a blood test within two hours of his arrest and the results of this test were not admitted in evidence. This required a finding of not guilty, under the express language of section 18.1-55 Virginia Code Annotated, of any offense under section 18.1-54. The Supreme Court of Appeals of Virginia has decided that the statute "itself calls for strict compliance with every provision in it." Otherwise, it states, the accused shall be found not guilty of the offense. *Lutz* v. *City of Richmond,* 205 Va. 93, 97-98, 135 SE (2d) 156, 160 cited in *Kyhl* v. *Commonwealth,* 205 Va. 240, 135 SE (2d) 768, 770.

In *Rowland* v. *City of Richmond,* — Va. — decided by that Court April 27, 1964, the defendant was denied a blood test because his signature on a release form was said by the doctor to be illegible. In that case the Virginia Court said:

> "Under the statute defendant, having consented to the taking of a blood sample for chemical analysis to determine its alcoholic content was entitled to have the test made. When the doctor refused to extract the blood the officer's duty in this respect

did not end. The defendant should have been taken forthwith to another qualified person to withdraw the blood sample".

"Since the chemical analysis of the defendant's blood was not made and received in evidence at the trial, through no fault of his own, then according to the statute his rights shall be deemed to have been prejudiced, and he shall be found not guilty of any offense under section 18.1-54. . . .".

In this case, as in *Rowland, supra,* the person refusing the test did not testify and it could be argued that the test was refused through the fault of the appellant in asking that his arm be sterilized with alcohol. Nevertheless, he insisted on a blood test which was refused him for some reason which is at best open to conjecture. He was deprived of the right to the blood test after requesting it, and if the language of the statute is mandatory in its requirement of the use of a substance other than alcohol, then the blood test, had it been given, would have been introduced in evidence.

Therefore, inasmuch as appellant requested the use of alcohol, there could not have been a "failure on the part of any person" to comply with every provision of section 18.1-55 requiring a finding of not guilty. Thus the appellant contends that he should have been found not guilty under the language of the statute requiring such a finding when a blood test is requested and not introduced in evidence "for any reason whatsoever".

3. The Court committed error in finding the appellant guilty upon evidence insufficient to constitute such guilt beyond a reasonable doubt.

The evidence in the record indicates that the appellant was observed weaving in the right lane of the high-

way at a place where traffic was one-way and that he did not cross the broken line to his left or leave the road to his right. Later, the officer testified, the appellant's speech was slurred and he staggered. There is a suspicion created, perhaps a strong suspicion, that the appellant, because of the odor of his breath and because he bumped into the wall next to the steps at the Courthouse, was under the influence. Whether he was actually operating a motor vehicle under the influence of intoxicants is conjectural in that common experience shows us that many drivers weave back and forth in their lane of traffic but are not necessarily under the influence when doing so.

The appellant contends that all of the evidence presented by the uncorroborated testimony of the single witness in this case is insufficient to exclude every reasonable hypothesis of innocence. The burden is upon the Commonwealth to prove beyond all reasonable doubt that the appellant committed the crime charged against him. *Coffey* v. *Commonwealth, supra,* at 188. The defendant should have been found not guilty.

4. The Court erred in its failure to find the appellant not guilty.

The trial court in this case ruled that the language of section 18.1-55 made mandatory the use of some substance other than alcohol which would not affect the accuracy of the test. Notwithstanding this ruling he did not require that the Commonwealth comply strictly with the statute because he found the appellant guilty despite the lack of any evidence of the nature of the substance to be used on the instruments for the test or that the substance so to be used would not in

fact affect the accuracy of the test. In pertinent part the statute says:

> "(f). . . . In the event that the Commonwealth fails to comply with any of the requirements of this section, then this failure shall be deemed a reasonable doubt of defendant's guilt".

Thus if the language of the statute is mandatory (which appellant contradicts) wherein it provides for using a substance other than alcohol, the Commonwealth has failed to comply by not providing the necessary proof of the nature of the substance to be used to sterilize the instruments and the statute deems this a reasonable doubt of appellant's guilt.

Therefore, appellant contends that the trial court erred in finding him guilty without the proof required by the statute.

5, The Court committed error in its ruling that the language of the aforementioned statute section 18.1-55 of the Code of Virginia of 1950 as amended, and in particular sub-section (c) thereof, makes mandatory the use of "some type of cleanser or sterilizer for the instruments used and for the part of the body from which the blood is taken, other than alcohol or other substance which might in any way affect the accuracy of the test". Actually such language is not mandatory but directory only, and would not permit refusal of appellant's request for the test because he asked that alcohol be used as a sterilizer.

The "implied consent" statute is penal in nature and penal statutes, of course, are to be strictly construed. A penal statute must be construed strictly against the state and cannot be extended by implication. *Wade* v.

Comm., 202 Va. 117, 116 S.E. (2d) 99. To constitute the offense the act must be both within the letter and spirit of the statute defining it. *Faulkner* v. *South Boston*, 141 Va. 517, 127 S.E. 380.

Penal statutes are construed strictly against the state and favorably to the liberty of the citizen. The intention of the legislature must govern in the construction of penal statutes and they are not to be construed so as to defeat the obvious intent of the legislature. It is the duty of the courts to adopt that sense of words which harmonizes best with context and promotes in the fullest manner the apparent policy and object of the legislature. At the same time, they must be construed strictly in favor of the defendant, not to the extent of defeating the clear intent of the legislature, but so as to resolve favorably to the defendant all reasonable doubts arising from the language used. 17 Michie's Jurisprudence, "Statutes", Sect. 67.

It is clear that this statute as emphasized in the *Rowland* case, *supra*, grants the right to a blood test when it is requested as the defendant here and in Rowland did. Strict construction of this statute would not permit abrogation of such a right but would require a construction favorable to the defendant.

Thus the dissection of Section (c) of Code Section 18.1-55 leads to obvious results, viz:

> "Only a physician, registered or professional nurse or graduate laboratory technician, [using some type of cleanser or sterilizer for the instruments used] and for the part of the body from which the blood is taken, other than alcohol or other substance which might in any way affect the accuracy of the test, [shall withdraw blood for the purpose of determining the alcoholic content therein. ."

Removing the language above in brackets we can see that it is mandatory that:

> "Only a physician ..... nurse ..... shall withdraw blood....."

Any interpretation other than that the language above is directory only and not mandatory would be to indulge in speculation as to the reason and wisdom of the legislature. One can only inquire whether, if the phrase above in brackets was intended to be mandatory, why the legislature did not insert instead of the word "using" the words "who shall use only" to make the language read:

> "Only a physician ..... or ..... technician, *who shall use only* some type of a cleanser or sterilizer for the instruments used and for the part of the body from which the blood is taken, other than alcohol or other substance which might in any way affect the accuracy of the test, shall withdraw blood ...."

However, as the Virginia Supreme Court of Appeals stated in *Lawrence* v. *City of Norfolk*, — va. —, Record No. 5749:

> "Our duty is to interpret statutes and ordinances as enacted by legislative bodies and not to rewrite them. We are not judges of the wisdom of legislation. That is purely a legislative matter."

Wherefore, your petitioner contends that no rules of statutory construction exist which would allow the language just discussed above, to be construed to deprive appellant of the purpose of the statute to give him the right to have a sample of his blood taken for chemical analysis when the statute made mandatory the use of some substance "other than alcohol or other

substance which might in any way affect the accuracy of the test".

Particularly, where the record is devoid of competent evidence that any substance was to be used which would not affect the accuracy of such a test, and the Commonwealth having failed, under the Court's ruling and the statute, to establish this fact, such failure in the express language of the statute section 18.1-55 of the Code of Virginia of 1950 as amended, is deemed conclusively as establishing reasonable doubt of appellant's guilt.

(B) The Effect of the Foregoing Errors Was to Deprive Appellant of Due Process of Law and the Equal Protection of the Laws

It is an ancient and time honored right of counsel to be heard by the judge before whom he pleads his case. It is the duty of a trial judge to hear and consider maturely what counsel may advance by way of argument in his client's behalf. It matters not that the argument may be legally fallacious *in toto*; there yet stands the duty of counsel to represent his client by arguing the merits of his position in the best light discernible to him and the concomitant obligation of the trial judge to sit and to listen with reasonable patience. If the judge is unwilling to understand this axiomatically accepted procedure, then he should not adorn the bench.

In *State ex rel Paoli* v. *Baldwin et al.*, 1947, 31 S (2) 627, 159 Fla 165, the Court trenchantly observed:

> "A hearing without the right to interpose reasonable and legitimate defenses cannot constitute due process of law."

Due process of law postulates that every person shall be accorded the protection of his day in court and an

opportunity to be heard, *Hamrick* v. *Bryan*, D.C. Okla. 1938, 21 F. Supp. 392.

In both civil and criminal cases both parties have a right to be represented by counsel at the trial. *Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55. The right of a party to be represented by counsel before the court extends to all stages of the trial and is not to be questioned. 53 Am. Jur. 43.

The unfettered right of an accused in a criminal trial to be represented by counsel is not fulfilled by counsel passively sitting in the court room. The exercise of such right contemplates the active and vigorous defense by counsel at each successive step of the proceeding. It is neither the privilege nor the obligation of counsel supinely to bow to judicial tyranny or misguided zeal. Due process of law under the 14th Amendment is not satisfied if the hearing was unfair although the end might be just. *State* v. *Clow*, 1943, 10 N.W. (2) 359, 215 Minn. 380.

In the trial below before the Circuit Court of Stafford County the motion to strike advanced by appellant's counsel was directed at the heart of the Commonwealth's case. By denying appellant's counsel the right to present his motion to strike the trial court eviscerated what undoubtedly was a competent and valid defense which would have resulted in the dismissal of the case. As a direct result thereof appellant was deprived of a privilege and immunity protected by the 14th Amendment against unlawful state action. *United States* v. *Sutherland*, D.C. Ga., 37 F. Supp. 344.

Inherent to the uncontradicted right to counsel is the corollary that *effective* assistance of counsel in a state court is a constitutional requirement of due process. *Reece* v. *State of Georgia*, 1955, 350 U.S. 85, 76 S. Ct. 167. By refusing to hear appellant's counsel argue

his pivotal motion to strike the trial court abridged a right of appellant protected by the 14th Amendment. The protective cloak of the 14th Amendment's due process clause was not intended to limit the counsel of an accused in a state trial to a token appearance and *pro forma* representation. *Brubaker* v. *Dickson,* C.A. Calif., 310 F (2) 30.

Wherefore, it respectfully is submitted that the abortive action of the trial court in refusing to permit counsel to present and argue the motion to strike operated directly to deprive appellant of due process of law and the equal protection of the laws within the contemplation of the 14th Amendment to the United States Constitution.

CONCLUSION

The appellant respectfully submits that for the substantial errors assigned, the judgment of the trial court and that of the Supreme Court of Appeals of Virginia should be reversed and final judgment entered dismissing this prosecution against petitioner as being contrary to law and, in particular, being repugnant to the Constitution of the United States.

JOHN ALVIN CROGHAN
1815 "H" Street, N. W.
Washington, D. C.
638-4328

F. CALDWELL BAGLEY
Dumfries, Virginia
703-875-9225

Attorneys for Appellant.

Of Counsel

STASSEN, KEPHART, SARKIS & SCULLIN
Washington, D. C.

APPENDIX

Warrant of Arrest

STATE OF VIRGINIA
COUNTY OF STAFFORD } To-Wit: No.——

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, Tpr. H. D. Northern has this day made complaint and information on oath before me, Irene Vazquez, J.P., of the said County, that John Thomas Redmond in the said County did on the 8th day of December, 1963: Unlawfully operate a motor vehicle upon the public highway while under the influence of alcoholic beverages, to wit: driving drunk. Against the peace and dignity of the Commonwealth.

• • •

Given under my hand and seal, this 8th day of December, 1963.

IRENE VAZQUEZ, J. P. (Seal)
(Title of Issuing Officer)

1 VIRGINIA:

IN THE CIRCUIT COURT OF STAFFORD COUNTY

COMMONWEALTH, *Complainant*

v.

JOHN THOMAS REDMOND, *Defendant*

Stafford, Virginia
Friday, January 31, 1964

The above-entitled cause came on to be heard before the Honorable S. Bernard Coleman, Judge of the Circuit Court of Stafford County, Stafford, Virginia, commencing at 10:20 o'clock a.m.

APPEARANCES:

For the Complainant:
R. H. L. CHICHESTER, ESQ.

For the Defendant:
F. CALDWELL BAGLEY, ESQ.

2 PROCEEDINGS

Mr. Bagley: I would like to have the reporter sworn, Your Honor.

The Court: All right.

(The reporter was sworn.)

The Clerk of the Court: Mr. Redmond, the charge is that you did in the County of Stafford on the eighth day of December 1963 unlawfully operate a motor vehicle upon a public highway while under the influence of alcoholic beverages against the peace and dignity of the Commonwealth.

How say you; guilty or not guilty?

The Defendant: Not guilty.

Whereupon

Herbert D. Northern

a witness, called on behalf of the Commonwealth, and after having been duly sworn, was examined and testified on his oath as follows:

Direct Examination

By Mr. Chichester:

Q. What is your name, sir? A. Herbert D. Northern.

Q. And by whom are you employed? A. Virginia State Police.

3 Q. Were you so employed on December 8, 1963? A. Yes, sir, I was.

Q. And while so employed, did you arrest John Thomas Redmond and charge him with operating a motor vehicle while under the influence of alcoholic beverages? A. Yes, sir, I did.

Q. Tell the Court the circumstances under which you arrested him please. A. On December 8, 1963 in Stafford County, I was traveling north on U. S. Route 1 just north of the court house in the oneway drive and I came up behind Sheriff MacGregor who was traveling north.

Sheriff MacGregor was following a '64 Pontiac sedan. The sedan—the Pontiac sedan was traveling north also at about 30 to 35 miles an hour and it was weaving in the right northbound lane of the highway.

I pulled up beside the Pontiac and blew the siren and the Pontiac pulled off to the right side of the highway and stopped, just this side of Austin Run. That is the north end of the oneway drive.

As I approached the Pontiac from the rear, Mr. Redmond, who is seated here, got out of the driver's side of the car and staggered as he got out of the car and then backed up against the left side of the car just to the

4 rear front door. I asked Mr. Redmond for his driver's license which he gave me. I noticed that there was a strong smell of intoxicating beverages on his breath as I was talking to him at the side of the car.

I arrested him for driving under the influence and asked him to come and get in my car. On the way back to the police car, he staggered as he walked. Deputy Sheriff Gilbert Samuels was riding with me and I asked Mr. Redmond if it was okay for the Deputy Sheriff to drive the Pontiac back to the court house. Mr. Redmond made no answer.

Mr. Redmond and I came on back to the court house and Deputy Sheriff Samuels followed in Mr. Redmond's car. When we got to the court house, Mr. Redmond asked me who had possession of his car. I advised Mr. Redmond that he would be required to take a blood test.

From the court house, we went to the Mary Washington Hospital. From the hospital we came back to the Justice of the Peace's office at Stafford and that is where I secured a warrant charging him with driving under the influence.

During this time Mr. Redmond asked me two or three times what he was charged with and when we came back to the court house and got out of the police car and started into the jail, there is a stone wall out there, a retaining wall, which has one set of steps coming up to the sidewalk; he started to come up the wall between the steps and the court house, started up the wall where there are no steps.

Any time Mr. Redmond walked from one place to the other, he staggered and his speech was slurred. We would ask him questions. I would try to tell him something and part of the time he would make you no answer at all.

Q. Mr. Northern, was he advised of his rights with regard to a blood test? A. Yes, sir, he was.

Q. Was a blood test taken? A. No, sir, it was not.

Mr. Chichester: That's all.

Cross Examination

By Mr. Bagley:

Q. Immediately prior to the time that you stopped Mr. Redmond's vehicle, you say that it was weaving in the driving lane? A. Yes, sir.

Q. Did he go off the road at any time? A. No, sir.

Q. Did he cross the center line at any time? A. No, sir.

6 Q. He was in his lane of traffic, in one lane and not in both lanes? A. Yes, sir.

Q. All right.

When he got out of the car, you say that he leaned against the side of the car? A. He got out of the car, he staggered. His feet first hit the ground and then he back up against the car just to the rear of the door on the left side.

Q. All right.

And did you talk to him at that time? A. Yes, sir, I did.

Q. And was his speech slurred at that time? A. Yes, sir.

Q. How could you tell that his speech was slurred? A. His words weren't plain when he spoke them.

Q. Had you ever heard him speek before then? A. No, sir. And when you would say something to him or ask him a question, he just looked like he was hypnotized, that he couldn't understand. He would make you no answer at all part of the time.

Q. All right.

7 Did he give you his operator's permit? A. Yes, sir, he did.

Q. And then what was the surface of the ground at this point? Was it sloped or level or what? A. It may be a slight slope to the ditch from the hard-surface portion of the highway.

Q. All right, sir.

Now you say he had a strong smell on his breath. A. Yes, sir.

Q. I believe you said a strong smell of intoxicating beverages. A. Yes, sir.

Q. Do you have any knowledge of whether this man had anything intoxicating to drink? Did your investigation reveal this? A. I didn't see anything in the car and I didn't see him drink anything.

Q. All right.

Was he given any type of test for his manual dexterity or anything of that kind? A. No, sir.

Q. No tests.

And then you say you advised him that he was
8 required to submit to a blood test. A. Yes, sir.

Q. Was that at the place where you made the arrest? A. No, sir. It was in the car, in the State Police car.

Q. At the scene of the arrest? A. At the scene of the arrest.

Q. And did he indicate to you that he wanted a blood test? A. Yes, sir, he did.

Q. Where was he taken for the blood test? A. Mary Washington Hospital in Fredericksburg.

Q. And you say no blood test was taken? A. No, sir.

Q. Now when you came back to stafford, you say he had some difficulty in negotiating the steps by the jail? A. Yes, sir. He started to walk into the wall first.

Q. It was dark; wasn't it? A. No, sir. It was nighttime but there are lights in front of the court house.

Q. Where was he when this happened? Was he with you? A. Yes, sir.

Q. Did you walk up the steps? A. Yes, sir.

9 Q. Was he in front of you, behind you or where?

A. At that time I was at the steps and he was over at the wall. He was to my right.

Q. He was walking beside you then; would that be a fair statement? A. Yes, sir.

Q. Can you tell the Court what the time interval was between the time of the arrest and this occurrence at the wall here? A. The arrest was at 12:10 a.m. and it was approximately 1:30.

Q. Approximately 1:30? A. A.M. when we were here.

Q. When you returned here? A. Yes, sir.

Q. Can you tell the Court how long, if you recall, you were at the hospital in Fredericksburg? A. I don't recall exactly. I'd say not more than 30 minutes.

Q. Not more than 30 minutes. A. (Nodding head.)

Q. Did the defendant at any time refuse a blood test? A. No, sir.

Q. He did request one. I believe you stated he requested a blood test and you took him to the hospital? A. He requested the blood test and then he refused to take the type test that they wanted to give at the hospital.

Q. Do you know what type of test they wanted to give at the hospital? A. Mrs. Anderson who is the nurse at the hospital wanted to use soap and water to wipe Mr. Redmond's arm with and he refused to let her give the test unless she would rub his arm with alcohol.

Q. He wanted his arm sterilized with alcohol? A. (Nodding head.)

Q. Do you remember the exact or can you remember the exact words which were used? A. No, I can't remember the exact words. I think I can remember the reasons that he gave at that time.

Q. Did the nurse make any attempt at giving him the blood test? A. No, sir. And the nurse called it to Mr. Redmond's attention that she was going to use soap and water to swab his arm. He said "No, I don't want it unless you use alcohol."

Q. Unless you use alcohol. A. (Nodding head.)

Q. All right.

What happened at that point? A. We left the hospital.

Q. And you were there how long? A. Approximately 30 minutes.

Q. 30 minutes. A. Mr. Redmond made a telephone call while we were there and you usually have to wait a few minutes for the nurse sometimes and then she has to fill out some records.

Q. Was Mr. Redmond from your observation required to sign anything there at the hospital? A. I don't recall whether he did sign anything or not.

Q. If he did, you didn't see him? A. If he signed it I saw it, but I don't recall now whether he signed anything or not.

Q. All right.

And was that about 12:30 or quarter of one when you were at the hospital? A. Yes, sir.

Mr. Bagley: I believe that is all, Your Honor.

Mr. Chichester: That's all.

The Court: Did I understand you to say that from
12 the time you first got the accused here until the warrant was issued that he asked you several times what he was charged with?

The Witness: Yes, sir, he did.

The Court: Did you tell him each time?

The Witness: Yes, sir, I did.

The Court: Now in the hospital where he said first that he wanted a blood test—he was taken to Mary Washington Hospital; is that correct?

The Witness: Yes, sir.

The Court: Tell me just what he did and said when the nurse started to use soap and water to sterilize his arm?

The Witness: Well, he was in the emergency room and the nurse makes preparation for the blood test by putting the different articles on the stretcher and then she had the man sit on a little stool there.

When she called Mr. Redmond's attention that she was going to use soap and water to rub his arm with first, Mr. Redmond objected to the taking of the test. He insisted, in fact he argued with the nurse that he wanted the test but he wanted it taken with alcohol put on his arm first and the nurse tried to explain to him and I tried to explain to him that alcohol couldn't be used. The
13 rules of the hospital and also the state law, as I understood it, you couldn't use alcohol and he still insisted that he would have the test but he wanted the alcohol on his arm first.

The Court: He refused to take the test unless alcohol was used; is that right?

The Witne. . Yes, sir.

Mr. Bagley: In view of that, may I ask one more question?

The Court: What?

Mr. Bagley: In view of the Court's inquiry, may I ask one more question?

The Court: All right.

Cross Examination

By Mr. Bagley:

Q. Trooper Northern, are you able to state to the Court here today that soap and water would not affect the accuracy of a blood test?

Mr. Chichester: I don't think he is qualified to answer that question.

The Court: Sustained.

Mr. Bagley: Your Honor, I asked him if he were able to state that to the Court.

The Court: He doesn't have to state it to the Court.

14 Mr. Bagley: I simply wanted to ask him if he were qualified to make that statement.

The Court: The Court knows what the usual process is in blood tests.

Mr. Bagley: Please note my exception.

(Witness excused.)

Mr. Chichester: That is the Commonwealth's case.

The Court: All right.

Mr. Bagley: If Your Honor please, I would like to make a motion to strike the Commonwealth's evidence on the following basis: First, if Your Honor please, in regard to the blood test, Section 18.1-55 of the Code in the following language, I assert to the Court, gives the accused person a right to the benefit of a blood test.

The Court: We admit that. There is no question about that.

Mr. Bagley: All right, sir.

And in Section (b) of 18.1-55 Virginia Code, sir, it does state that any person who operates a motor vehicle upon

a public highway in this state shall be deemed thereby to have agreed to, consented to and shall be entitled to a blood test and further in the same subsection (b), it states: but if the person arrested does not refuse
15 to permit the taking of blood, the person arrested shall be entitled to the benefit of such test.

Then the next section, if Your Honor please, states that only a physician, registered professional nurse or a graduate laboratory technician shall take or shall withdraw blood. Parenthetically in this section, the legislature has included the following phrase: "using some type of a cleanser or sterilizer for the instruments used and for the part of the body from which the blood is taken other than alcohol or other substance which might in any way affect the accuracy of the test."

That is where the words "shall withdraw blood" follow.

And now if Your Honor please, in Section (f) of this statute, it is stated among other things and I quote: "But when the person arrested requests or consents to the taking of a blood sample, if the result is not received in evidence for any reason whatever including but not limited to the failure on the part of any person—"

The Court: All right. Let me ask you this, Mr. Bagley.

Mr. Bagley: Yes, sir.

The Court: Suppose now that the accused here demanded, as he did, that alcohol be used as a cleanser
16 or sterilizer and that nurse had done that, what would be your position?

Mr. Bagley: If the nurse had done that, Your Honor, it would be my position that the accused would fall in the section under subsection F.

The Court: There is no exception.

Mr. Bagley: In Subsection F there is an exception, Your Honor, please. It says it won't be admitted for any reason including but not limited to the failure on the part of any person and then they say "except the person who is accused".

I'd say if he had asked for alcohol and it had been used, he could never come to this Court and say that alcohol would affect the outcome of the test.

The Court: That statute expressly says that alcohol shall not be used.

Mr. Bagley: No, Your Honor, it does not.

The Court: It does say it but I won't argue about it.

Mr. Bagley: No, I don't want to argue with the Court. I just want to say that the language is not mandatory.

The Court: Your motion is overruled.

Mr. Bagley: All right, sir.

May I be permitted to finish my argument?

The Court: Well, not on that line.

17 Mr. Bagley: I haven't finished my argument, Your Honor please.

The Court: I am not going to sustain your motion, Mr. Bagley, on the theory that this man has gone here and demanded which the law says shall not be done.

Mr. Bagley: If Your Honor please, not by way of argument, may I read that particular section?

The Court: No. I am thoroughly familiar with that.

Mr. Bagley: All right, sir.

Your Honor please, may I note an exception to the Court's ruling?

The Court: Certainly you may note an exception.

Mr. Bagley: I have no evidence to present.

Mr. Chichester: That's the case, Your Honor.

Mr. Bagley: I would like to argue, if Your Honor please.

The Court: If that is the only question you want to argue, your motion will be overruled.

You have no evidence to present?

Mr. Bagley: No, sir. I would like to make a statement to the Court if I may.

The Court: All right. Go Ahead.

18 Mr. Bagley: Do you want to say something?

Mr. Chichester: No.

Mr. Bagley: I would say, if Your Honor please, I

realize that in a motion to strike we are not dealing with the element of reasonable doubt. I can only state to His Honor at this point that we are concerned, before this man is found guilty of this offense, with the matter of whether the Commonwealth's evidence is sufficient to establish this case beyond a reasonable doubt and sufficiently to overcome the presumption of innocence which he has a right to.

I would state certainly with no evidence that the Commonwealth has complied with the statute, that Section F would apply and there certainly is a doubt raised—first of all, there is no evidence before the Court whatever if this statute is mandatory as this Court has ruled that the substance that they wanted to use on this man's arm would not affect the accuracy of the test.

The Commonwealth is required strictly to observe every element to the statute and since he does not, it creates a reasonable doubt and I would say too, Your Honor, on the basis of testimony of their one witness and no other evidence, there certainly is no burden shifted to the accused to proceed to put on evidence to establish his
19 own innocence. He is presumed to be innocent.

I would ask on that basis that the Court find this man not guilty under the language of the statute.

Mr. Chichester: If it please the Court, it seems to me that the Commonwealth has amply carried the burden put upon it and the testimony is this: that the accused was first detected while driving an automobile in an erratic manner.

Secondly, that when he left his automobile, he was in a staggering condition, he had an odor of alcohol on his breath. According to Trooper Northern, his senses were numb. He didn't answer questions as an ordinary man would.

It seems to me that that bears the burden that is made upon the Commonwealth and I feel that there should be a conviction under those facts.

The Court: Do you have anything further, Mr. Bagley?

Mr. Bagley: No, sir.

The Court: On the evidence produced, the Court finds you guilty of operating a motor vehicle on the highways in this state while under the influence of alcoholic beverages and fixes your punishment of $200 and cost.

It is therefore the judgment of the Court that
20 you are guilty as charged in this warrant of operating a motor vehicle on the highway while under the influence of alcoholic beverage and that you pay a fine of $200 and cost.

Mr. Bagley: Your Honor, please, may I respectfully note an exception to Your Honor's judgment and may I make a motion at this time, Your Honor?

The Court: Yes.

Mr. Bagley: I would like to move that the Court, if I may be permitted, suspend the execution of this sentence for a period which may appear appropriate to the Court in order that I may perfect an appeal.

The Court: Well, if you are going to appeal, why, of course, you get a bond and it will be suspended.

Mr. Bagley: Yes, sir.

The Court. All right.

Mr. Bagley: I only ask that the Court suspend execution of the sentence until perhaps 30 days so I can perfect an appeal.

The Court: You are moving now, as I understand it, for suspension in judgment in order to—let the order read this way: that the accused, having signified his intention of applying to the Supreme Court of Appeals of Virginia,
the execution of this sentence is suspended for a
21 period of 30 days in order to afford the accused the opportunity to perfect this appeal and to furnish bond as required by law.

Mr. Bagley: Thank you, Your Honor.

(Whereupon, at 11:05 a.m., the hearing in the above-entitled matter was closed.)

Opinion

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 8th day of October, 1964.

The petition of John Thomas Redmond for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Stafford County on the 31st day of January, 1964, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A copy, Teste:
H. F. TURNER
Clerk

SUPREME COURT OF APPEALS OE VIRGINIA

No.

JOHN THOMAS REDMOND, *Appellant*

v.

COMMONWEALTH OF VIRGINIA, *Appellee*

Notice of Appeal to the Supreme Court of the United States

I. Notice hereby is given that John Thomas Redmond, the appellant above named, through counsel, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of Virginia affirming the judgment of conviction entered herein on the 8th day of October, 1964.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Appellant was convicted of the crime of operating a motor vehicle on the highways of Virginia while under the influence of alcoholic beverages in apparent violation, although nowhere specifically so stated, of Section 18.1-54, Code of Virginia, 1950 (Michie), and was sentenced to pay a fine of $200.00.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) the warrant of arrest dated 8 December, 1963

(b) the transcript of proceedings had in the Circuit Court of Stafford County, Virginia, in the case of *Commonwealth* v. *John Thomas Redmond*, on the 31st day of January, 1964.

(c) the notice of Appeal and Assignments of Error addressed to the Clerk of the Circuit Court for the County of Stafford, Virginia, on the 28th day of February, 1964.

(d) the Petition for an Appeal and Supersedeas filed by appellant in the Supreme Court of Appeals of Virginia on May 29, 1964.

(e) the order of the Supreme Court of Appeals of Virginia, entered on the 8th day of October, 1964, affirming the judgment of the Circuit Court for the County of Stafford, Virginia, and refusing the writ of error and supersedeas.

(f) this Notice of Appeal.

III. The following federal questions arising under the Constitution of the United States are presented by this appeal:

(a) Whether the appellant was denied due process of law under the Fourteenth Amendment to the U.S. Constitution when the trial judge in the Circuit Court for Stafford County, Virginia, summarily and arbitrarily refused to hear appellant's counsel argue his Motion to Strike the Commonwealth's Evidence based on an highly technical, controversial and legal interpretation of the Virginia blood test statute, Section 18.1-55 of the Code of Virginia, 1950 (Michie). Appellant alleges and is prepared to show that such action on the part of the trial judge effectively deprived him of a hearing.

(b) Whether the trial judge denied the appellant the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States when he enforced against appellant an interpretation of the Virginia blood test statute, Section 18.1-55 of the Code of Virginia, 1950 (Michie) patently at variance with the clear mandate of the statute and widely inconsistent with the accepted pattern of judicial precedents adopted and followed by the Supreme Court of Appeals of Virginia for many years.

E. CALDWELL BAGLEY,
Dumfries, Virginia,
Telephone: 703-5-9225

and

STASSEN, KEPHART, SARKIS & SCULLIN

By

JOHN ALVIN CROGHAN,
824 Federal Bar Building,
1815 H Street, N. W.
Washington, D. C.
Telephone: 202-638-4328

Attorneys for Appellant

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